

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
TVT License, Inc.)	File No. BRCT-20040927AMD
)	
For Renewal of License of)	
Station WTVT(TV))	
Tampa, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2007

Released: July 24, 2007

By the Chief, Video Division:

I. INTRODUCTION

1. The Commission, by the Chief, Video Division, has before it a January 3, 2005, Petition to Deny filed by Jane Akre and Steve Wilson ("Petitioners") against the license renewal application of TVT License, Inc. ("TVT"), licensee of Station WTVT(TV), Tampa, Florida. On March 24, 2005, TVT, an indirect subsidiary of Fox Television Holdings, Inc., filed an Opposition to Petition to Deny, to which Petitioners filed a reply on April 25, 2005.¹ For the reasons set forth below, we deny the Petition to Deny and grant the above-captioned license renewal application.² We further admonish TVT for its acknowledged violation of its public file obligation under sections 73.3526(e)(9) and 73.1202 of the Commission's rules.

II. BACKGROUND

2. This case follows a lawsuit filed by the Petitioners on April 2, 1998, alleging that Station WTVT(TV) violated the Florida whistle-blower's statute by firing the Petitioners for threatening to disclose a violation of the Commission's news distortion policy. The Petitioners, who are husband and wife, worked as the investigative news unit for Station WTVT(TV) from December 1996 until December 2, 1997, after which the station decided not to renew their employment contract. Prior to the decision not to renew the employment contract, the Petitioners and the station's news and legal management engaged in a prolonged struggle over a series of news reports regarding the use of synthetic bovine growth hormone ("BGH") by Florida dairy farmers, the details of which are set forth in extensive deposition and

¹ Various requests for extensions of time and oppositions have been filed. We will exercise our discretion and consider any late-filed pleadings, and the allegations raised therein, that have been filed by the parties as informal objections. Thus, we do not need to address the merits of the requests. *See* 47 C.F.R. § 73.3587.

² This action is taken pursuant to authority delegated by sections 0.61 and 0.283 of the Commission's rules. 47 C.F.R §§ 0.61 and 0.283.

trial testimony collected during the employment lawsuit.³ The BGH report did not air during the Petitioners' tenure, but the Petitioners did complete an unaired version. Station WTVT(TV) subsequently hired a new investigative reporter, Nathan Lang, who completed a different version of the BGH report that aired on three consecutive nights in May 1998.

3. Mr. Wilson lost his lawsuit at trial on a jury verdict, while Ms. Akre won a partial verdict. An appeals court overturned Mrs. Akre's partial verdict, however, concluding that the Florida whistleblower's statute did not apply to the case since the news distortion policy was not an "adopted rule" as defined by the statute.⁴ Neither the trial nor the appellate court found that TVT violated the news distortion policy.⁵

4. *Petitioners' Allegations.* The Petitioners argue that the licensee failed to serve the public interest by "broadcasting what was known to be false, distorted, and slanted news reports that were held out to the public to be accurate and without bias."⁶ The gravamen of this allegation is that the news managers of Station WTVT(TV) and its Fox corporate parent demanded changes in their BGH report as a result of letters sent to the President of Fox News, Roger Ailes, on February 21 and February 28, 1997, by legal counsel for Monsanto, the company that produces BGH. In the letters, Monsanto threatened "dire consequences" if the report were to air in Florida. The Petitioners state that they later learned that the station also received calls from certain Florida dairymen and Winn-Dixie also voicing their displeasure at the direction of the report. The Monsanto letters contained many scientific points that allegedly guided the BGH report that the station ultimately aired, but, according to the Petitioners, were demonstrably false. The Petitioners state that two false statements in the final BGH report were particularly troubling: one from a Monsanto spokesperson who stated during an interview that milk from cows injected with BGH "is the same safe and wholesome product" as milk from cows not injected with BGH; and a second from Mr. Lang who told viewers that he personally investigated the BGH issue by visiting and talking with all the individuals involved. The Petitioners contend that milk from BGH-injected cows is not the same as milk from cows not injected with the hormone, and further state that Mr. Lang only interviewed two BGH critics. The Petitioners have attached declarations from these two BGH critics who state that their positions were misrepresented

5. The Petitioners have also attached a list of what they claim are misleading statements aired in the final BGH report. These statements include, for instance, assertions about the number of scientists that support the use of BGH; assertions involving the adequacy of testing performed by the FDA; and use of the term "approve" as opposed to "support" when referring to the position of the American Medical Association on the BGH controversy. They also argue that the BGH report failed to challenge certain statements from the Monsanto representative, in particular Monsanto's assertion that "cancer experts don't see a problem" with BGH.⁷ The Petitioners argue that by airing the interviews without challenging specific statements, the BGH report gave the impression that the station supported these statements.

³ The Petitioners launched a website publicizing the BGH dispute on the same day they filed suit in Florida state court.

⁴ *Opposition to Petition to Deny* at Exhibit 1, Page 4.

⁵ Although there has been much back-and-forth among the parties about whether the jury in the employment lawsuit found that Station WTVT(TV) violated the news distortion policy, the verdict form did not ask the jury to determine whether WTVT(TV) violated the news distortion policy, but rather to determine whether Station WTVT(TV) fired either employee for threatening to disclose what the Petitioners *reasonably believed* would be a violation of the news distortion policy. In any event, the Commission would not be bound by a state court's interpretation of the Commission's own rules and policies.

⁶ *Petition to Deny*, at 1.

⁷ *Id.* at 17.

6. The Petitioners further allege that management of Station WTVT(TV) and its Fox corporate parent “pressured, coerced, and threatened” the Petitioners into producing an unaired BGH report that contained demonstrably distorted, false and slanted information. The Petitioners cite statements made by Station WTVT(TV)’s managers and other events that allegedly occurred during the editorial review process to support their news distortion allegation. The Petitioners attach as a separate exhibit the information they would have included in their BGH report had they not been so pressured during the editorial process. In addition to arguing that this evidence demonstrates a violation of the news distortion policy, Petitioners argue that such actions demonstrate that TVT does not have the character qualifications to remain a licensee.⁸

7. The Petitioners further argue that Station WTVT(TV) and its Fox corporate parent have engaged in a pattern of misconduct that has continued since the BGH report. The Petitioners complain in particular about a subsequent report that was to be aired on the station’s noon news program about the artificial sweetener Aspartame, a chemical that is also produced by Monsanto. The Petitioners contend that Station WTVT(TV) producer Cindy Simmons abruptly cancelled the appearance of Aspartame critic Mary Nash Stoddard allegedly because of “legal concerns.”

8. The Petitioners finally argue that Fox owned-and-operated Station WDAF-TV, Kansas City, Missouri, also violated the news distortion policy when its News Director, Michael McDonald, decided not to pursue a story about the BGH controversy, allegedly because of the ongoing dispute at Station WTVT(TV). As support, they provide an affidavit from Brian Karem, the reporter at Station WDAF-TV who raised with Mr. McDonald the possibility of pursuing the BGH story. The Petitioners also allege that management at Station WDAF-TV and counsel representing the corporate parent Fox Television Stations, Inc., showed “egregious mishandling of the public airwaves” when copies of a report on the chemical Dursban were provided to the chemical’s producer, Dow Chemical, in advance of broadcast. Mr. Karem states that, under his strenuous objections, he was told to “sanitize” the report so as to appease Dow.

9. *TVT’s Response.* TVT argues that the Commission’s news distortion policy has an extremely limited scope, and that the criticisms leveled against TVT by the Petitioners are precisely the type of criticisms that the Commission has said would not be a basis for a news distortion claim. TVT denies that it tried to conform the BGH report to the February 21 and February 28, 1997, letters from Monsanto’s counsel, but maintains that many of the issues discussed in the BGH report were the subject of scientific dispute. In light of the complex scientific nature of the controversy, TVT states that Station WTVT(TV)’s news managers believed it was responsible journalism to include Monsanto’s defense that milk from treated cows was the same as milk from cows not injected with BGH. TVT specifically denies that Station WTVT(TV) misreported the interviews from the two BGH critics cited by the Petitioners.

10. TVT argues that the Petitioners’ list of misleading statements “is simply a laundry list of every way in which [P]etitioners believe that they would have done the [BGH] report differently, either by including information that [Lang] did not include, by characterizing information in a different way, or by not reporting the views [of those] with whom they disagree.”⁹ In any case, TVT argues that such ‘quibbles’ are not supported by extrinsic evidence of intentional falsification of the news. TVT states that, at trial, “all the news managers, counsel, and station managers who had any involvement with [P]etitioners or their BGH report testified that they had no intent to distort the news.”¹⁰ TVT further states that “[n]o witness – not even petitioners – testified that any WTVT manager, news director, or

⁸ *Id.* at 14.

⁹ *Opposition to Petition to Deny*, at 55.

¹⁰ *Id.* at 36.

counsel ordered petitioners to lie about or fabricate the news.”¹¹

11. TVT states that the editorial team sought to produce a report that was fair, balanced, and supportable in the event Monsanto carried out its threat to sue. TVT argues that Ms. Akre admitted under oath that the station’s news director intended to produce a fair and balanced BGH report, and has attached to its opposition as evidence a transcript of her relevant testimony. Again providing specific citation to the record in the civil suit, TVT denies that Dave Boylan, the station’s General Manager, requested any changes to the story; denies that Mr. Boylan threatened to fire the Petitioners unless they acceded to his demands; and denies that Mr. Boylan was told by the Petitioners that they would report the allegation of news distortion to the Commission.

12. TVT argues that the Petitioners have failed to establish a *prima facie* case of news distortion during the Aspartame story aired on the Station WTVT(TV) noon news program interview segment “Your Turn” as the Petitioners have no personal knowledge of the events at issue. According to TVT, the Aspartame critic mentioned by the Petitioners reappeared on the station’s “Your Turn” segment along with a doctor supporting the safety of Aspartame. According to TVT, Ms. Simmons postponed Mrs. Stoddard’s appearance because she wanted to provide more balance to the segment by booking a guest with an opposing viewpoint.

13. TVT states that the allegations involving Station WDAF-TV are irrelevant to determining whether Station WTVT(TV) has been serving the public interest in Tampa, and that the station exercised its editorial discretion not to pursue the BGH story. TVT states that Mr. Karem, in deposition testimony taken as part of the employment lawsuit and attached to the opposition, testified that Station WDAF-TV did not intend to “kill” the proposed BGH story, but rather to delay airing the story until the dispute over the BGH report was resolved. As to the Dursban story, TVT, again citing the attached deposition testimony, argues that Mr. Karem did not allege that anyone at Station WDAF-TV intentionally falsified the news, only that it was “inaccurate” or “sanitized” in unspecified ways. TVT states that Dow had refused to sit for an interview to discuss the Dursban allegation, and the news managers believed the quickest way to get the Dursban story out was to allow them to comment. According to TVT, Mr. Karem testified that the news managers provided the tape to Dow because “they honestly felt that that was the best way to be fair, to be expedient and to avoid litigation.”¹²

III. DISCUSSION

14. *Standard.* Section 309(k)(1) of the Communications Act of 1934, as amended (the “Act”), states that the Commission shall grant a license renewal application, if it finds, with respect to that station, that (a) the station has served the public, interest, and convenience; (b) there have been no serious violations by the licensee of the Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.¹³ Under section 309(d) of the Act, any interested person may petition for the FCC to deny or to set for hearing any application for a broadcast license renewal.¹⁴ Section 309 requires a hearing if the FCC finds that the application presents a “substantial and material question of fact” or if it is otherwise unable to conclude that granting the application would serve the

¹¹ *Id.* at 25.

¹² *Id.* at 61.

¹³ 47 U.S.C. § 309(k)(1).

¹⁴ 47 U.S.C. § 309(d) (petition must contain “specific allegations of fact sufficient to show that...a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]. Such allegations of fact shall...be supported by affidavit of a person...with personal knowledge thereof.”).

public interest.¹⁵

15. The Commission applies a two-step analysis to a petition to deny under the public interest standard. The Commission first determines whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.¹⁶ This first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”¹⁷ If a petition meets this first step, the Commission determines whether, “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a substantial and material question of fact as to whether granting the application would serve the public interest.¹⁸ Courts have held that, in making this determination, the Commission has wide discretion, in that it must consider not only the petitioner’s evidence, but must weigh that evidence against the facts offered in rebuttal;¹⁹ may draw factual and legal inferences from undisputed evidentiary facts;²⁰ and may determine how much weight to accord disputed facts based on the record before it.²¹ A substantial and material question is raised when the totality of the evidence arouses a sufficient doubt on the question of whether grant of the application would serve the public interest that further inquiry is called for.²²

16. *News Distortion Analysis.* In evaluating whether an allegation of news distortion impacts the licensee’s ability to serve the public interest, the Commission analyzes both the “substantiality” and “materiality” of the allegation.²³ An allegation is “material” only if the licensee itself is said to have participated in, directed, or at least acquiesced in a pattern of news distortion. An allegation of news distortion is “substantial” if it meets two conditions: it is deliberately intended to slant or mislead,²⁴ and it involves a significant event and not merely a minor or incidental aspect of the news report.²⁵ It is sufficient for a petitioner to raise a “substantial and material question of fact” as to intent, and the Commission cannot require a petitioner to demonstrate “intent.”²⁶ However, the Commission determines in the first instance whether the evidence submitted raises a substantial question of fact.²⁷

17. Section 326 of the Act prohibits the Commission from censoring radio communications, and the First Amendment to the Constitution strictly limits the Commission’s authority to interfere with the programming decisions of licensees.²⁸ In light of these limitations, and because journalistic or editorial

¹⁵ *Id.* at § 309(e).

¹⁶ 47 U.S.C. §309(d)(1); *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”).

¹⁷ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”).

¹⁸ *Astroline*, 857 F.2d at 1561; 47 U.S.C. §309(e). *See also Gencom, Inc.*, 832 F.2d at 181.

¹⁹ *Astroline*, 857 F.2d at 1561.

²⁰ *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972).

²¹ *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C.Cir.1985) (“*Citizens for Jazz*”).

²² *Id.*

²³ *Serafyn v. FCC*, 149 F.3d 1213, 1216-17 (D.C. Cir. 1998) (“*Serafyn*”).

²⁴ *Id.* at 1217.

²⁵ *Id.*

²⁶ *Id.* at 1220.

²⁷ *Id.*

²⁸ 47 U.S.C. §326; U.S. CONST., amend. I.

discretion in the presentation of news and public information is the core concept of the First Amendment's Free Press guarantee, "the Commission's policy makes its investigation of an allegation of news distortion 'extremely limited in scope.'"²⁹ In showing an intent to distort, "[i]t is not enough to dispute the accuracy of a news report...or to question the legitimate editorial decisions of the broadcaster."³⁰ Allegations of deliberate distortion must be supported by extrinsic evidence "such as written or oral instructions from station management, outtakes, or evidence of bribery."³¹ With respect to a report's accuracy in particular, the Commission has stated that it possesses "neither the expertise nor the desire to look over the shoulder of broadcast journalists and inquire why a particular piece of information was reported or not reported."³² To do otherwise "would involve the Commission deeply and improperly in the journalistic functions of broadcasters."³³ With respect to "extrinsic evidence," the *Serafyn* court stated that "[t]he Commission has the responsibility to determine the weight of such evidence."³⁴ The court, among other things, held that the Commission must consider all of the extrinsic evidence together and cannot dismiss particular pieces of evidence in a piecemeal manner.³⁵ Upon a review of all the evidence before us, we conclude that the Petitioners have not raised a substantial and material question of fact concerning an intent to distort.³⁶ As discussed below, the totality of the evidence in the record before us indicates that this case involves a legitimate editorial dispute between the Petitioners and the news management of Station WTVT(TV) rather than a deliberate effort by the licensee to distort news.

18. We cannot conclude that the Petitioners' claims of factual inaccuracy in the final BGH report support an inference that TVT intentionally distorted news. Our examination of the record indicates that the safety of dairy products from BGH-injected cows is a matter of considerable controversy and scientific complexity. The Food and Drug Administration approved the use of BGH in 1993, and the American Medical Association (AMA), American Cancer Society, and American Dietetic Association have issued statements supporting its safety.³⁷ Other scientists, individuals, and organizations maintain that BGH use is a public health threat, and that milk producers and suppliers have not disclosed its presence in their products adequately.³⁸ Under these circumstances, the truth of the complained-of Monsanto statement in the final BGH report that milk from BGH-injected cows is as "safe and wholesome" as other milk, and the adequacy of the testing performed by FDA, cannot be "readily and definitively resolved," and it would be inconsistent with longstanding Commission precedent to draw an inference of distortion on the basis of these alleged factual inaccuracies.³⁹ Likewise, with regard to the Petitioners' contentions that Nathan Lang, the investigative reporter who replaced the Petitioners at TVT,

²⁹ *Serafyn*, 149 F.3d at 1217, quoting *Galloway v. FCC*, 778 F.2d 16, 21 (D.C.Cir. 1985)

³⁰ *Galloway v. FCC*, 778 F.2d at 20.

³¹ *Id.*

³² *In Re CIA*, 58 Rad.Reg2d (P & F) 1544, 1549 (1985).

³³ *Hon. Harley O. Staggers ("Selling of the Pentagon")*, 21 Rad.Reg.2d (P & F) 912, 916 (1971).

³⁴ *Serafyn*, 149 F.3d at 1221

³⁵ *Id.* at 1220.

³⁶ Consequently, because we are concluding that the Petitioners have failed to raise a substantial and material question of fact of news distortion, we need not determine here whether the Petitioners' allegations make out a *prima facie* case. *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996) (Commission is not required to rigidly follow two-step process, and can focus first on second step in evaluating a petition to deny).

³⁷ *Opposition to Petition to Deny*, at 4.

³⁸ *Petition to Deny*, at 8.

³⁹ *Complaints Covering CBS Program "Hunger in America,"* 20 FCC 2d 143, 147 (1969), quoted in *Serafyn v. FCC*, 149 F.3d 1213, 1223 (D.C. Cir. 1998).

misrepresented both the extent of his personal investigation and the positions of two BGH critics that he did interview, “[t]he Commission cannot appropriately enter the quagmire of investigating the credibility of the newsman and the interviewed party in such a type of case.”⁴⁰ Further, the complained-of statements about the number of scientists that support BGH’s use, and use of the term “approve” rather than “support” in reference to the AMA’s position, do not affect the final BGH report’s basic accuracy.⁴¹ And the FCC long has eschewed second-guessing the type of journalistic judgment embodied in TVT’s decision not to challenge certain Monsanto statements in the report, including the assertion that “cancer experts don’t see a problem” with BGH use.⁴² Finally, we note that the final BGH report presented both sides of the controversy, including interviews with scientists and farmers on both sides and discussion of the difficulty of determining whether or not milk for sale at local supermarkets comes from BGH-injected cows. Taken together, therefore, none of the factual inaccuracies alleged by the Petitioners in the final BGH report are egregious or obvious enough to raise an inference of intent to distort.⁴³

19. We also conclude that the Petitioners’ allegations of TVT and Fox pressure in the production of their own, unaired BGH report, and that they would have included additional information in the report absent such pressure, do not raise a substantial question of intent to distort. There is no evidence that any such pressure was applied to the final BGH report. Mr. Lang testified during the employment lawsuit that WTVT’s general manager never mentioned anything more specific about the BGH report than that it concerned “cows and hormones and milk,” and that “[n]o one at WTVT ever suggest[ed] that we broadcast anything with known lies in the content.”⁴⁴ Ms. Akre, one of the Petitioners, acknowledged during her testimony that WTVT’s News Director Phil Metlin sought to produce a balanced report.⁴⁵ Although the Petitioners cite a number of specific statements made to them by TVT management during the editorial process that are supportive of their claims, we must consider all of the evidence together in determining whether they have raised a substantial and material question.⁴⁶ On the whole, our examination of the record reflects a legitimate editorial dispute between the Petitioners and TVT, rather than a deliberate effort to coerce the Petitioners into distorting the news. The record reflects fundamental disagreement about the BGH report’s purpose: the Petitioners contend that it was to “expose for the first time the little-known fact that much of Florida’s dairy herd was being secretly injected” with BGH,⁴⁷ whereas TVT contends that it was merely to update viewers on a prior controversy by showing that grocers had not fulfilled a 1994 pledge to ask suppliers not to provide milk from BGH-injected cows until the product had gained public acceptance.⁴⁸ Ms. Akre testified that Phil Metlin acted as an arbitrator between the Petitioners and other members of the editorial team.⁴⁹ Although the Petitioners maintain that TVT and Fox were unduly influenced by threatening Monsanto letters and by communications from other interested parties, testimony from the employment lawsuit submitted by TVT indicates that its news managers had concerns about the potential bias of the Petitioners’ draft BGH report prior to receiving the first Monsanto letter.⁵⁰ Moreover, it would be inconsistent with the limited scope of the news distortion

⁴⁰ *Id.*

⁴¹ See *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985).

⁴² See *Hunger in America*, 20 FCC 2d at 147.

⁴³ See *Serafyn*, 149 F.3d at 1224.

⁴⁴ *Opposition to Petition to Deny*, at Exhibit 10, page 5, 6.

⁴⁵ *Id.* at Exhibit 2, page 15.

⁴⁶ See *Serafyn*, 149 F.3d at 1216.

⁴⁷ *Petition to Deny*, at 8.

⁴⁸ *Opposition to Petition to Deny*, at 3-4.

⁴⁹ *Id.* at Exhibit 2, pages 111-112.

⁵⁰ *Id.* at Exhibit 2, pages 131-133.

policy to second-guess TVT's decisions to include Monsanto's position in its final BGH report and to exclude certain information that the Petitioners would have chosen to include.⁵¹

20. We further conclude that the Petitioners' allegations involving the Aspertame report fail to make out a *prima facie* case that TVT engaged in a pattern of news distortion. Even if true, the abrupt cancellation of an Aspertame critic's appearance due to "legal concerns" does not support an inference of deliberate news distortion.

21. We further find that the actions of Station WDAF-TV have no bearing on whether Station WTVT(TV) violated the news distortion policy or otherwise failed to serve the public interest. Under the plain terms of section 309(k)(1) of the Act, the Commission cannot deny a renewal based on violations that occurred at a different station because the relevant findings must be made with respect to the station seeking renewal of its license.⁵² To the extent that the Petitioners allege that the events at WDAF-TV support their allegations of news distortion by reflecting a pattern of interference by Fox in its commonly-owned stations' news reports, the Petitioners have failed to raise a substantial question of fact because they have submitted no evidence that Fox itself was involved in WDAF-TV's decision not to pursue the BGH report. In any event, the decision not to pursue a story falls within the legitimate editorial discretion of the licensee, and does not implicate the news distortion policy.

22. *Public Inspection File.* Sections 73.3526 and 73.1202 of the Commission's rules require all broadcast licensees to maintain a public inspection file and to retain written and e-mail comments and suggestions from the public in such file.⁵³ Licensees must retain letters and e-mails for 3 years from the date they are received,⁵⁴ but are not required to respond to viewer letters or e-mails. The rules require licensees to place specific types of information in their public inspection files in a timely manner. The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period.

23. The Petitioners acknowledge that the majority of letters and e-mails sent to Station WTVT(TV) from viewers concerning the BGH report were not received by the station within the last 3 years, and thus not required to be part of the station's public inspection file. On December 13, 2004, the Petitioners along with two volunteers visited Station WTVT(TV) with the purpose of inspecting the station's public files. The Petitioners have attached to the Petition to Deny copies of 3 e-mails allegedly sent to the station within the 3-year window that were not made part of the public files. The copies were sent to the Petitioners via e-mail to their website. The Petitioners also allege that "public comments received electronically during the entire month of September 200[3] were missing and unable to be located by station officials at the time."⁵⁵

24. TVT asserts that Station WTVT(TV)'s public inspection file does contain correspondence relating to the BGH issue. TVT argues that the Petitioners have not provided evidence to substantiate its claim that Station WTVT(TV) actually received the three e-mails attached to the Petition to Deny. TVT does, however, acknowledge that public comments sent electronically during the month of September 2003 were inadvertently omitted from the public file. TVT explains that Station WTVT(TV) generally downloads to a diskette all the e-mails received by the station's mail server, apparently at the end of each month. The diskettes are then placed in the station's public file, and the public is given access to a

⁵¹ See *Hunger in America*, 20 FCC 2d at 147.

⁵² 47 U.S.C. § 309(k)(1).

⁵³ 47 C.F.R. §§ 73.3526(e)(9)(i) and 73.1202.

⁵⁴ 47 C.F.R. §§ 73.3526(e)(9)(i) and 73.1202(a).

⁵⁵ *Petition to Deny*, at 26.

computer terminal at which the contents of the diskettes may be reviewed. TVT states that at the end of September 2003 the station designated a new employee to be responsible for the public inspection file, but that during this transition the diskette containing the September 2003 e-mails was inadvertently left in the desk of the employee tasked with this responsibility. TVT asserts that it has placed the diskette in its public inspection file, and has procedures in place to ensure that its public inspection file complies with the Commission's rules. It contends that an omission of a small amount of material from the public inspection file does not raise a substantial and material question of fact concerning TVT's qualifications.

25. Based upon the Petitioners' and TVT's statements, we believe that TVT failed to maintain WTVT(TV)'s public inspection file in accordance with the Commission's rules by including all of the public comments received by the station during the preceding three years in the station's public inspection file, including the public comments received by the station electronically during the month of September 2003 and, possibly, three e-mails related to the BGH controversy that also were sent to the Petitioners via e-mail to their site. However, there is no evidence that TVT's apparent violations of the public inspections file rule were widespread or repeated or that TVT had any intention not to comply with the rule's requirements. Instead, the record demonstrates that TVT has taken steps to insure that WTVT(TV)'s public inspection file is maintained in accordance with the requirements of section 73.3526. Under these circumstances, we believe that, even assuming that station WTVT(TV) received the three e-mails related to the BGH controversy but did not place them in the station's public file, the resulting public file deficiencies would not disqualify TVT as a Commission licensee or raise a substantial and material question of fact concerning its qualifications to be a Commission licensee requiring designation of station WTVT(TV)'s license renewal application for hearing.⁵⁶

26. TVT has, however, conceded that Station WTVT(TV) has failed to comply with sections 73.3526 and 73.1202 of the Commission's rules, at least with respect to e-mails received in September 2003. In assessing an appropriate remedy for a violation of the Commission's rules, we must take into account the statutory factors set forth in section 503(b)(2)(D) of the Act,⁵⁷ including the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require. The violation here appears to have been an isolated occurrence. Accordingly, we will admonish TVT for its acknowledged violation of sections 73.3526 and 73.1202 of the Commission's rules.⁵⁸ We remind TVT that the Commission expects licensees to maintain public inspection files that are fully compliant with the Commission's rules.

IV. ORDERING CLAUSES

27. Accordingly, **IT IS ORDERED**, that TVT License, Inc., licensee of Station WTVT(TV), Tampa, Florida, is hereby **ADMONISHED** for its acknowledged failure to place in its public inspection file the electronic comments received by Station WTVT(TV) during September 2003, as required by sections 73.3526(e)(9)(i) and 73.1202 of the Commission's rules.

28. **IT IS FURTHER ORDERED** that copies of this order shall be sent by Certified Mail, Return Receipt Requested, to John C. Quale, Esq., Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, N.W., Washington, D.C. 20005, counsel for TVT License, Inc.

⁵⁶ See *In Re WEZB(FM)*, 13 FCC Rcd 4102, 4106 (1997), *aff'd* 15 FCC Rcd 7164 (1999). We cannot conclude definitively that the three e-mails attached to the Petition to Deny actually were sent to the station because the e-mails were sent to the Petitioners' website, not the station, and the station was not copied in the e-mails.

⁵⁷ 47 U.S.C. § 503(b)(2)(D).

⁵⁸ See, e.g., *American Family Assoc., Inc.*, 18 FCC Rcd 16530 (Enf. Bur. 2003) (admonishing licensee for public file violations in light of good faith efforts to comply with the rules).

29. **IT IS FURTHER ORDERED** that the Petition to Deny filed by Jane Akre and Steve Wilson **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau